# No. 14,772

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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RICHARD C. LAMKIN and
ANTHONY B. SILVIA,
*Appellants,*

vs.

BROWN AND ROOT, INC., PACIFIC BRIDGE COMPANY, INC., MAXON CONSTRUCTION COMPANY, INC., UTAH CONSTRUCTION COMPANY, INC., and SWINERTON and WALBERG, a Co-Partnership, Joint Adventurers doing business Under the Name of Brown-Pacific-Maxon,
*Appellees.*

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

## APPELLANTS' OPENING BRIEF.

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### JURISDICTION.

This is an appeal from a Summary Judgment entered by the District Court of Guam on the 15th day of March, 1955, in favor of the appellees herein, the defendants in the Court below. Jurisdiction to hear this appeal is in this Court, pursuant to the provi-

sions of Sections 1291, 1294, Title 28 U.S.C.A. This action arises under and seeks the construction of the Internal Revenue Code of 1939 as amended, the Internal Revenue Code of 1954, and the Organic Act of Guam, Chapter 8 A, Title 48, U.S.C.A.

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**STATEMENT OF THE CASE AND QUESTIONS PRESENTED.**

This case is one seeking a determination of the rights of appellants' employers to withhold sums of monies from appellants' wages and without appellants' consent to turn over such monies so withheld to employees or officers of the Government of Guam or to anyone else.

Appellees are joint-adventurers, exclusively engaged in performing certain construction in Guam under a cost-plus fixed fee contract with the United States Navy. This contract has been in effect for several years. Appellees' offices within Guam are situated upon Military Reservations of the United States.

Appellees, to fulfill their contract obligations, have employed various individuals under written contract to work on construction projects at any Island or Base west of the 180th Meridian, or within the Western Pacific Area. Appellants, upon being so employed by appellees, were assigned to work being performed by appellees for the United States Navy on the Island of Guam.

Appellant Lamkin was employed by appellees in the State of Colorado in September, 1952, executing a

contract of employment dated at Denver on the 17th day of that month. Under that contract appellant Lamkin came to the Island of Guam and has since worked for appellees.

Appellant Silvia entered into similar contracts with appellees, the first having been executed in the State of Massachusetts in the year 1948.

Both appellants have been employed by appellees within Guam pursuant to these contracts or under modified and renewed ones. Neither appellant is, or claims to be, an employee of the United States, or a resident or citizen of Guam, and have retained their permanent domicile in their respective State of residence. Appellants, while on Guam, have been employed by appellees on construction work at United States Military Reservations and have resided in quarters provided by appellees situated on a Military Reservation.

Appellees have caused their employees to execute, since the latter part of 1950, United States Treasury Department Forms W-4 (employees withholding exemption certificate). Such forms were executed by appellants Lamkin on November 20, 1952, and Silvia on December 15, 1950, respectively. Neither appellant ever executed any similar form with respect to any tax other than taxes due, if any, to the United States. Appellees have deducted from the wages of appellants and other employees at the rates provided by the United States Internal Revenue Code and regulations for United States taxes. However, such sums have

not been paid over to the United States Treasury, or any officer thereof, but were paid over to the Treasurer of the unincorporated territory of Guam. Appellants, at no time, have authorized such payment.

Payment by appellees to the Government of Guam was pursuant to a claim of that Government that appellants owe income taxes to it; that it has such a tax and authority to collect; and that such taxes are in the same amounts as would be due to the United States. The Government of Guam allegedly having assessed deficiencies and claiming additional monies from appellants delivered to appellees purported levies and warrants of distraint, demanded payment from appellees of the wages due, and to become due to appellants, until these demands were met. Appellees refused to pay wages to appellants, withholding the same when due, turned the wages due and earned by appellants over to the Government of Guam.

Commencing upon the 30th day of September, 1954, wages due to appellants were not paid until the sum of $504.26 due to appellant Lamkin, and $221.85, due to appellant Silvia had been retained and turned over to the Government of Guam upon this alleged debt.

Appellants, never having authorized such payment and asserting that they were not indebted to the Government of Guam, accordingly commenced this action, seeking damages for breach of their employment contracts and for depriving them of their property without due process of law, for repayment of the sums of money due to appellants, improperly withheld and paid to the Government of Guam to restrain

the appellees in the future from wrongfully withholding monies from their wages contrary to Title 26 U.S.C.A. and turning such monies over to agents of the Government of Guam.

After several extensions of time given appellees within which to answer, the United States Attorney for Guam, appearing for appellees under their contract which provides that the United States will defend actions brought against appellees arising from such contract, moved to dismiss the complaint and for summary judgment. It should be noted that the United States is not a party to this action and also that the Government of Guam has never intervened or sought to. Appellants filed thereupon an amended complaint. Disregarding the amended complaint, the District Court of Guam proceeded to conduct a brief hearing and granted the motion for summary judgment.

Appellants alleging numerous errors by the District Court of Guam accordingly noticed this appeal. The claimed errors, we believe, fall into two categories, first procedural in the application of the Federal Rules of Civil Procedure, errors which unfortunately confuse and obscure the issues; and, second, misconstruing and misapplying the pertinent statutes of the United States.

The questions to be decided are, briefly, was the District Court of Guam in error in holding that no genuine issue as to a material fact existed? In entering summary judgment for appellees, basing the same on an insufficient affidavit and in disregard of the admissions of appellees.

In knowing judicially facts not before the Court and resting the judgment upon such facts.

In treating the affidavit of appellees as proof of the facts therein alleged rather than as proof of the existence or non-existence of a controverted fact.

In holding and entering judgment contrary to the provisions of the statutes of the United States and upon a complaint not before the court.

In entering judgment based upon the court's preconceived judgment and misconstruction of the statutes of the United States.

Appellants view this controversy as not a contest as to whether or not the Government of Guam has a tax, but did appellees have any right, legal or otherwise, to do the acts complained of. Was there before the District Court of Guam any evidence which can in any measure justify the acts of appellees. This is an action between private parties seeking relief from the illegal retaining of appellants' pay and giving it away, to restrain such action in the future, and for damages.

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**CONSTITUTION, STATUTES AND RULES INVOLVED.**

Constitution, of the United States.

> Article VI. ". . . This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, . . .".

Amendment IV. "The right of the people to be secure in their . . . papers and effects, against unreasonable . . . seizures, shall not be violated, . . .".

Amendment V. "No person . . . , nor be deprived of life, liberty, or property, without due process of law, . . .".

Title 26, U.S.C.A.

Section 53. Time and place for filing returns.

(b) To whom return made.

(1) Individuals. Returns (other than corporation returns,) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland.

(2) Corporations. Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the Collector at Baltimore, Maryland. 53 Stat. 28.

Section 62. Rules and regulations.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter. 53 Stat. 32.

Section 272. Procedure in general.

((a) (1) Petition to the Tax Court of the United States.) If in the case of any taxpayer,

the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.

Section 273. Jeopardy assessments.

(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

Section 1621. Definitions. As used in this subchapter.

(a) Wages. The term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid— . . . (8) . . . (B) for services for any employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 per centum of the remuneration to be paid to the employee by such employer during the calendar year will be for such services, . . .

Section 3612. Returns executed by Commissioner of Collector:

"(a) Authority of collector. If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise;

"(b) Authority of Commissioner. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise;

"(1) To make return. Make a return, or

"(2) To amend Collector's return. Amend any return made by a collector or deputy collector.

"(c) Legal status of returns. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

"(d) Additions to tax.

"(1) Failure to file return. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax: Provided, That in the case of a failure

to make and file a return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after August 30, 1935, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

"(2) Fraud. In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount . . .

"(f) Determination and assessment. The Commissioner shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. 53 Stat. 437."

Section 3640. Assessment authority:

"The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law. 53 Stat. 442."

Section 3650. Collection districts:

"(a) Establishment and alteration. For the purpose of assessing, levying, and collecting the

taxes provided by the internal revenue laws, the President may establish convenient collection districts, and may from time to time alter said districts.

"(b) Number. The whole number of collection districts for the collection of internal revenue shall not exceed 65.

"(c) Boundaries.

"(1) Hawaii. The Territory of Hawaii shall constitute a district for the collection of the internal revenue of the United States, with a collector, whose office shall be at Honolulu, and deputy collectors at such other places in the several islands as the Secretary shall direct.

"(2) Elsewhere. For the purpose mentioned in sub-section (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district. 53 Stat. 445."

Section 3655. (a) Delivery.

Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof.

Section 3670. Property subject to lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount

(including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

Section 3671. Period of lien:

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. 53 Stat. 449."

Section 3690. Authority to distrain.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. 53 Stat. 451.

Section 3692. Levy.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670

exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. 53 Stat. 452.

Section 3797. Definitions.

". . . (11) Secretary. The term 'Secretary' means the Secretary of the Treasury.

(12) Commissioner. The term 'Commissioner' means the Commissioner of Internal Revenue. . . . .".

Section 3901. Powers and duties.

"(a) Assessment and collection. The Commissioner, under the direction of the Secretary—

(1) General Superintendence. Shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue; and

"(2) Regulations, form, stamps, and dies. Shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; and shall provide hydrometers, and proper and sufficient adhesive stamps and stamps or dies for expressing and denoting the several stamp taxes, or, in the case of percentage taxes, the amount thereof; and alter and renew or replace such stamps from time to time, as occasion may require."

Section 3967. Prohibition upon discharge of another collector's duties.

"No collector shall be detailed or authorized to discharge any duty imposed by law upon any other collector. 53 Stat. 484."

Section 4041. Issue of instructions, regulations and forms:

"(a) In general. The Secretary shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws; and he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law . . ."

Title 28 U.S.C.A.

Section 1331. Federal question; amount in controversy:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Section 1340. Internal revenue; customs duties:

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

Section 1343. Civil Rights:

". . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for

equal rights of citizens or of all persons within the jurisdiction of the United States."

Section 1357. Injuries under Federal Laws:

"The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State."

Title 48 U.S.C.A.

Section 1421. (b) Bill of Rights.

". . . (e) No person shall be deprived of life, liberty, or property without due process of law.

"(f) Private property shall not be taken for public use without just compensation . . ."

Section 1421h. "Duties and taxes to constitute fund for benefit of Guam.

"All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam

in accordance with the annual budgets. Aug. 1, 1950, c. 512, § 30, 64 Stat. 392."

Section 1421i. "Applicability of Federal income tax laws:

"The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam. Aug. 1, 1950, c. 512, § 31, 65 Stat. 392."

F.R.C.P. Rule 56.

". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

"(e) Form of Affidavits; Further Testimony.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

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## SUMMARY OF ARGUMENT.

Appellants claim that the District Court erred and should be reversed. This action commenced by appellants for a breach of their employment contracts and

resulting damages was converted into a tax case by the affidavit of appellees and so treated and disposed by the Court.

The District Court erred in holding that no genuine issue as to a material fact remained, controverted of course, existed and in entering the summary judgment for the appellees upon an affidavit insufficient upon its face one which in fact clearly demonstrated the existence of numerous material issues which are controverted and upon which evidence should be received. Of course the preconceived concept of the Court that this action is solely and exclusively a tax action against a defendant who is not a party may well have led to the error.

The District Court assumed and acted upon that assumption, that certain facts have been conclusively established and therefore there could be no merit in this action. The Court could not have held as it did unless it held the following facts to be proved. Yet these facts are beyond proper judicial knowledge and we submit have nowhere been established. That there is a territorial income tax, rather than the United States tax; that the Government of Guam has power to require withholding and has, contrary to Section 1621 T 26, U.S.C.A.; that there is no question as to the existence of the alleged offices, the occupants of which are claiming the power and right to enforce this tax, that their offices were duly created, yet no such statute in fact exists, that all necessary powers have been delegated, an act contrary to Title 26, U.S.C.A.; that the question is not "Have appellees the right to

act as they have," but "Do appellants owe a tax?" Clearly, the Court took improper notice of facts and acted upon such notice.

The Court improperly accepted the affidavit as conclusive proof to the contrary of facts pled in the complaint rather than considering the question, "Were these materials facts in issue and controverted?" We claim likewise the Court misconstrued the rules concerning the effect of an amended complaint.

That the Court had prejudged the action and did not consider the possibility that appellants might be able to prove by competent evidence the non-existence of the tax, the offices, the delegation of powers, the validity of the levies, liens, assessments and warrants of distraint, or any of the other points, the contrary proof of which would demolish the edifice so carefully constructed by the Court without evidence. Clearly, this record, as well as the record in other similar cases, demonstrates beyond all doubt that the District Court intended that in a case of this type no sufficient opportunity to demonstrate by evidence the untenable position of the Government of Guam shall be afforded. The Court will not admit evidence to demonstrate facts that are contrary to its concepts.

The record in its entirety clearly shows that all the acts of appellees are unjustified; that they rely upon mere claims of officers asserting authority clearly contrary to statute and which cannot be delegated; that review of this record and the pertinent statutes conclusively demonstrates that the Court did not consider or apply the canons of statutory construction. Miscon-

strued statutes so plain and clear as not to require construction, judicially noticed as true facts not in existence and refused to notice that explicit provisions of Federal Law were being violated and do forbid the acts set forth of certain agents of Guam.

Therefore, the District Court of Guam should be reversed.

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## ARGUMENT.

Careful review of the errors to be relied upon dictates that the first three should be considered together in the interest of brevity and clarity and the others discussed separately. The errors claimed fall into two categories—procedural and the misconstruction of the pertinent statutes which govern this case.

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## I.

**THE DISTRICT COURT OF GUAM ERRED IN (1) HOLDING THAT NO GENUINE ISSUE AS TO A MATERIAL FACT REMAINED, (2) ENTERING SUMMARY JUDGMENT IN FAVOR OF APPELLEES, (3) BASING THE JUDGMENT UPON AN INSUFFICIENT AFFIDAVIT AND DISREGARDING THE ADMISSIONS OF APPELLEES. (POINTS 1, 2, 3.)**

(1). The Court erred in holding that no genuine issue as to any material fact remained. This error is clearly apparent upon a comparison of the complaint and the affidavit with exhibits of Mr. Marshall. For example: Appellants contend that appellees are private contractors. Appellees (T R 14) assert themselves to be ". . . solely and exclusively an administra-

tive service . . . on behalf of the Government of the United States."

Appellants contend that they have not authorized appellees to withhold any sums except for taxes due to the United States. Exhibits "C" and "E" to Mr. Marshall's affidavit support this. Yet, appellees assert that they have paid such sums to the Treasurer of Guam.

Appellants contend that they are not indebted to the Government of Guam. Appellees (T R 16) set forth the contention that 98 of their employees, including appellants, were alleged indebted to the Government of Guam.

Appellants (T R 17) the alleged levy and distraint and the honoring of the same "pursuant to the commands of said official . . ." comparing these with the allegations of fact set forth in both the complaint and the amended complaint, namely, that the appellees are obeying certain orders of agents of the Government of Guam, the validity of which is challenged; that appellees have breached the contracts of employment by refusing to pay wages when due; that certain agents of the Government of Guam, whose demands appellees have honored, claim to be authorized by certain sections of Title 26, U.S.C.A., a fact denied by appellants; that certain officers of the Government of Guam claim authority to administer, alter and amend Title 26, U.S.C.A., a right which appellees accede to but controverted by appellants.

Appellees assert to believe that the levies are authorized by the Revenue Act of 1939. Appellants assert

that no such authority is granted by any statute of the United States. Appellants deny any indebtedness to the Government of Guam.

Appellants assert that Section 1622 (a), (d), (g), (k), Title 26, U.S.C.A. giving withholding rates do not apply within Guam, and are contrary to Section 1621, Revenue Act of 1939, and Section 3401 of the Revenue Act of 1954. Appellees profess to believe that withholding within Guam is authorized.

Comparing the allegation of the complaint with the facts and conclusions of the affidavit, appellants contend that there are numerous genuine material facts to be determined. Appellants believe that not only is to be determined the question of breach of their employment contracts, the validity of the levies and warrants of distraint, but also the authority of the agents purporting to exercise such powers. That these matters must be proved by evidence, that they are in issue and are material and to be a good defense to the actions of appellees they must be proved by competent evidence and cannot be either implied or assumed.

Rule 56, F.R.C.P. provides that summary judgment shall not be granted unless it is clear that no material issue of fact exists and the moving party is entitled to judgment as a matter of law. Clearly, the files in this case demonstrate the existence of numerous genuine issues of fact.

Therefore, the District Court of Guam erred in holding that no genuine issue remained.

(2). Summary judgment cannot be entered unless no genuine issue as to a material fact exists and the

moving party is entitled to judgment as a matter of law. As set forth above, the existence of numerous genuine issues is clearly disclosed by the files. Under Rule 56, F.R.C.P. this precludes summary judgment and the District Court of Guam was in error.

An affidavit cannot controvert a fact well pleaded and the moving party must clearly demonstrate that no controverted issue of fact remains. Implied within this rule must be the natural inference that an affidavit which demonstrates the existence of controverted facts cannot sustain a summary judgment.

*Van Brode Milling Co. v. Kellogg Company,* 132 F. Supp. 330.

> ". . . In this Circuit it is the law that an affidavit can not be used to controvert a well pleaded allegation of the complaint in order to obtain a summary judgment. Frederick Hart & Co. v. Recordgraph Corp., 3 Cir., 169 F. 2d 580; Reynolds Metals Co. v. Metals Disintegrating Co., 3 Cir., 176 F. 2d 90. Frederick Hart & Co. v. Recordgraph Corp., 3 Cir., 169 F. 2d 580, at page 581 distinctly states '. . . no matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it. . . .'
>
> "(2, 3) . . . Under all the authorities, a motion for summary judgment should not be granted unless the truth is clear and the moving party is entitled to a judgment beyond all doubt and no genuine issue remains. . . ."
>
> ". . . Cases hold that the question presented by a motion for summary judgment is whether or not

there is a genuine issue of fact, and not how or by what evidence that issue is to be determined."

"(4) . . . Of course, a party moving for summary judgment (here the defendants), has the burden of showing that no controverted issue of fact exists. All of the cases so hold."

*Gifford v. Travelers Protective Assn.,* 153 F 2d 209 (9 Cir.).

". . . (2, 3) The question presented by a motion for summary judgment is whether or not there is a genuine issue of fact, and not how that issue should be determined. Ramsouer v. Midland Valley R. Co., 8 Cir., 1943, 135 F. 2d 101. A summary judgment may issue for laches or failure to bring suit within a prescribed period of limitations. United States for Use and Benefit of Genessee Sand & Gravel Corporation v. Fleisher Engineering & Construction Co., D.C.N.Y. 1942, 45 F. Supp. 781; Reynolds v. Needle, 1942, 77 U.S. Appl. D.C., 132 F 2d 161."

It is believed that these cases sufficiently set forth the rule as to when summary judgment may be granted. That appellees do not come within the rule is clear. The District Court of Guam was in error in entering judgment for appellees.

(3). The District Court of Guam erred in entering summary judgment for appellees since the affidavit was insufficient and the admissions of appellees clearly demonstrate that they should not prevail.

The rule is clear and needs no citation of authorities. To warrant summary judgment the movant must

demonstrate that there exists no controverted fact. Unfortunately, the District Court of Guam was misled by the incident that the events which gave rise to this action were the attempt by agents of the Government of Guam to collect an alleged tax debt, claimed due to that Government. However, this is an action between two private parties—an employee and his employers. The action is for breach of contract, damages, and to prevent the employers from continuing to carry out threats to violate the rights of appellants under their contracts of employment. No Government is a party to the action.

Appellees seek to demonstrate that their acts are justified by showing by affidavit that the agents of the Government of Guam claim the right to levy and distrain; that a debt to the Government of Guam exists; that they believe such agents had such authority; and that, therefore, their breach of the terms of the employment contracts are justified and summary judgment should be had. Is the affidavit sufficient proof of these matters? Hardly!

Can the affidavit controvert the allegation in the complaint that appellants do not owe the monies? Can the affidavit establish the validity of the distraint, of the levies? Is it proof of the compliance with the essential steps of valid assessment, valid notice? Does it prove delegation pursuant to law by the Commissioner of Internal Revenue to these alleged agents of the Government of Guam of the powers and authorities which the appellees state in their affidavit they believe these alleged agents possess? Appellants be-

lieve that clearly the affidavit upon its face is not only insufficient but clearly itself raises numerous issues of fact which can only be proved or disproved by evidence.

The appellees did, in fact, admit that they had paid over wages due to appellants under their employment contracts, and subsequent to the filing of this action to agents of the Government of Guam. A clear admission of breach of contract. That when demanded to by local officers they intended to continue to comply in the future.

Appellees show by their Exhibits "C" and "E" that the only authority they possessed to withhold was for taxes due to the United States. They admit that the monies were not paid to the United States or its agents. Can appellees excuse their wrongful acts by saying "We were informed" (by whom?) "We believed, therefore, our acts are justified." Is not the burden upon appellees to prove that they acted properly and not to merely assert a conclusion in an affidavit. Is it not the duty of appellees to prove every material fact to show that they were justified in acting as they did once they admitted failing to pay wages to appellants as the contract provided? Should not appellees demonstrate by proof the defense which they attempt to set forth. The defense is a conclusion to be derived from evidentiary facts. Where are the facts and what are they? This affidavit is in the nature of a confession and avoidance. Can such sustain summary judgment? Is it not necessary to prove the grounds upon which the avoidance rests?

Appellants contend that the District Court of Guam erred in entering summary judgment and should be reversed.

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## II.

**THE DISTRICT COURT OF GUAM WAS IN ERROR IN KNOWING MATTERS JUDICIALLY, WHICH WAS NOT A PROPER SUBJECT OF JUDICIAL KNOWLEDGE, WHICH WAS NOT CALLED TO THE COURT'S ATTENTION OR SUCH NOTICE INVITED AND CONSIDERING SUCH FACTS IN ARRIVING AT THE JUDGMENT.**

This action only incidentally and in a collateral way touches upon, or has anything to do with, taxes. It is one brought by employees against their employers for breach of contract in not paying over wages due and earned, for damages arising from such breach, to restrain further breaches, and a claim that appellants' property was taken contrary to the provisions of the Constitution and Bill of Rights of Guam without due process of law. Appellants alleged in their complaint that the Government of Guam claimed that they were indebted to it, that it claimed their wages from their employer denied any such debt and brought this action against such employer to recover for the employers' wrongful act in confiscating their wages and giving that money to agents of the Government of Guam; also for damages for this tortious breach of contract.

Appellees, by affidavit, in support of their motion for summary judgment, attempt to justify their unlawful actions and set forth that they obeyed the commands of agents of the Government of Guam, that

they had been advised that the acts which they admitted were lawful.

Appellees admitted the contracts of employment with appellants; the United States withholding forms that were executed; that they did not pay the money over to the Government of the United States, or its agents. Appellees set forth copies of the purported levies and warrants signed by one Harry L. Mangerich as Commissioner of Revenue and Taxation. Appellees thereupon relying upon their conclusion that their acts were legal and they exculpated and proceeded no further.

The District Court of Guam went further than the parties and held as a matter of law that it had been established, conclusively it must be presumed, that the following facts had been established. (How also explain the amazing transcript and the judgment?):

First, that the Government of Guam both can and has required withholding of income taxes. This, despite Section 1621 of Title 26, U.S.C.A. which by the claim of this same Government is now a portion of their statutes. (T R 71-72.)

Second, that the sole issue is whether or not Section 31 of the Organic Act gives the local Collector authority to require withholding and to distrain; clearly a finding based upon nothing before this Court that such was in Section 31, that this Collector has such power and that the Courts had so held conclusively (T R 72); that a motion for summary judgment places the matter at issue (T R 73); that the question is whether or

not appellants owed the tax rather than as claimed that appellees had no authority to, contrary to the employment contracts, take appellants' monies and give them to another (T R 75). Thus, clearly, finding the fact to be that all matters pertaining to this alleged tax have been conclusively determined; that the Court knows these facts without evidence; that Court has so determined these facts, the same learned Court hearing this motion—the District Court of Guam; that the appellees are only doing what they are required to do in law. (T R 75.) "The collector has the authority." (T R 75.) If this is not judicially knowing a fact in issue without evidence, nothing is.

The District Court held (T R 76) that "It certainly is res judicata in that in principle this is a proper tax to be paid to the proper officials of the local Government".

Appellants assert that these excerpts and citations from the learned Judge of the District Court of Guam's comments at the hearing on this motion clearly demonstrate that the Court had found, knew, or held numerous facts to be so solely upon the belief and knowledge of the learned Court (sic). Appellants believe that the matters which a Court can know in the absence of evidence are the common phenomena of nature, matters of common knowledge to all mankind. To know that a matter is *res judicata* in principle is to stretch a rule of law rather to its limits. Clearly the transcript discloses that the District Court of Guam neither considered the allegations of fact nor heeded the issues. The Court clearly found that

there were proper collection officials and that they had the proper machineries. Yet none of these facts so lightly found are supported by any evidence and appellants believe are matters to be proved by appellees in this action for breach of contract.

*Leong Kin Wai,* 23 F 2d 789, "Judge's personal knowledge may not be basis of decision, if not matter of general knowledge."

*Brown v. Piper,* 91 U.S. 37, "In determining whether a court should take judicial notice of a particular fact, every reasonable doubt upon the subject should be resolved promptly in the negative". Yet, all the controverted facts were without any evidence found to exist by the Court. See also *Fountain v. Tilson,* 336 U.S. 681; *Koepke v. Fontecchi,* 177 F 2d 125.

Appellants assert that the District Court of Guam accepted as true and as established without need for proof all the necessary facts to support the defenses of appellants. All this, appellants contend, is in error and the District Court of Guam should be reversed.

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## III.

**THE COURT ERRED IN ACCEPTING THE AFFIDAVIT OF APPELLEES AS PROOF, CONCLUSIVE AGAINST THE ALLEGATIONS OF THE COMPLAINT RATHER THAN TESTING THE AFFIDAVIT AND THE COMPLAINT TO DETERMINE WHETHER THERE WERE ANY CONTROVERTED FACTS IN ISSUE.**

The Court was in error in accepting the affidavit of appellees as proof, of the controverted facts, that they

were justified in turning over to agents of the Government of Guam wages due to appellants; of the fact that the demands made upon appellees were proper; that the warrants of distraint and the levies were legal, made by the duly authorized officer; and that all requisite steps to their validity had been established. All this in the face of the fact that everything was controverted and appellees were sued for breach of contract. The Court was further in error in holding that these are facts not requiring evidence but were of their very nature matters of law. Appellants can see that as a matter of law an official may have certain powers, duties and authorities but contends that it is a question of fact as to who is that officer and whether or not certain duties were delegated to him. Yet matters of this nature were found by the District Court of Guam from one affidavit.

49 F Supp. 45, Aff. 134 F 2d 173. "A summary judgment on supporting affidavit should not be granted a defendant if record discloses any basis for a claim of plaintiff." Did the record in this case show conclusively that no merit was in the claim of appellants? We believe not; yet, unless that be so, the summary judgment upon one affidavit was erroneous.

One who moves for summary judgment has the burden of showing conclusively that there is no genuine issue of fact. Did this affidavit do so? Did, or in fact, could it prove the facts upon which its conclusions were of necessity based? Appellants state that not only did it not do so but that it could not do so. Yet, the District Court of Guam accepted as proven all the

controverted facts assumed in the affidavit. This, appellants claim, was error.

In fact, does not defendants' motion admit the allegation of fact of the complaint?

Appellants contend that the Court erred in giving weight to facts assumed in the affidavit of appellees since the file itself clearly demonstrated the existence of controverted facts all material to the issues of this case.

Therefore, the District Court of Guam should be reversed.

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## IV.

**THE DISTRICT COURT OF GUAM ERRED IN FINDING CONTRARY TO THE CLEAR COMMAND OF THE STATUTES OF THE UNITED STATES AND ENTERING JUDGMENT BASED UPON SUCH ERROR.**

The District Court found that appellees had full protection for their acts in withholding sums from the wages of appellants, paying the same over to agents of Guam. That, therefore, it necessarily followed no liability to appellants existed. The District Court of Guam appears to be either playing upon words or to be confusing terms.

If the United States Congress has enacted a statute for Guam, or elsewhere, it is the command of the Congress that must be obeyed. No subordinate Governmental agency commands or requires with respect to that law. The only statutory authority cited, and this we believe, any court can notice, Section 31

of the Organic Act 1421i, Title 48, U.S.C.A. provides very clearly that the Income Tax Laws of the United States shall apply in Guam. No other law is applied or mentioned. There is no modification or deletion from the text of that law contained in the text of the Organic Act of Guam. Appellants assert that it must be held as a matter of law that the Income Tax Laws (of course excluding such portions of Title 26 as do not apply to Income Tax) in their entirety apply to Guam as a United States statute and not as a local law, that with respect to withholding it is the provisions of that statute which must govern.

Appellants believe that the Congress did not apply these laws as altered, amended or rewritten but in their entirety as enacted by Congress.

Guam is specifically defined as a possession of the United States. Section 1621 of Title 26, U.S.C.A., which is, appellants contend, part of the Income Tax Laws of the United States, specifically provides (A) "Wages. The term 'wages' means all remuneration . . .; except that such term shall not include remuneration paid . . . (8) . . . (B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States . . ."

Clearly, the applicable statute of the United States exempts from withholding the wages of the appellants.

Thus, the District Court of Guam was in error in holding that withholding is or was required by

the statute. Its holding that appellees therefore were justified in doing the illegal act complained of and could avoid the consequences of their breach of contract was clearly contrary to the express terms of the statute. The judgment entered upon such erroneous premise is plainly contrary to the statute and should be reversed.

This Court may notice the fact that no local statute of Guam exists requiring withholding, or, in fact, that no local statute concerning any phase of income tax has ever been enacted.

Appellants contend, therefore, that the only statute concerned is the income tax law of the United States, that such statute exempts Guam as a possession from withholding and, therefore, the judgment of the District Court should be reversed as contrary to law.

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## V.

**THE DISTRICT COURT OF GUAM ERRONEOUSLY CONSIDERED AND ENTERED SUMMARY JUDGMENT UPON A COMPLAINT WHICH WAS NOT BEFORE THE COURT HAVING BEEN SUPERSEDED BY AN AMENDED COMPLAINT.**

Rule 15, F.R.C.P. provides that a party may amend his pleading once as a matter of course. This appellants did, before any responsive pleading had been filed.

*Kuhn v. Civil Aeronautics Bd.,* 183 F 2d 839.

The effect of an amended pleading is to supersede the original. It therefore is the one to be considered.

That the District Court of Guam at the hearing upon the motion disregarded the amended complaint, stating that no change had been made except to add a fourth count of no merit.

Appellants relying upon the plain text of the Federal Rules did not attempt to controvert with affidavits the affidavit in support of the motion, believing that a new motion would of necessity have to be filed or the old one re-filed.

Appellants believe that the Court erred in considering or discussing the original complaint and, therefore, the entry of summary judgment was contrary to the rules and improper.

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## VI.

### THE DISTRICT COURT OF GUAM WAS IN ERROR IN ENTERING SUMMARY JUDGMENT BASED UPON THE COURT'S PRECONCEIVED BELIEFS AS TO THE MERITS OF THE CASE.

In various other actions several of which have been or which are before this Court and which appellants believe this Court may judicially notice the District Court of Guam has clearly set forth the convictions which rule the mind of that Court when considering any action which, in any manner, is concerned with the alleged territorial income tax of Guam. In like manner, this preconception of the law, and we believe, the facts, is demonstrated by the transcript of the hearing in the present action.

It may well be a philosophy of Government and of law, new and novel to many of us trained and nurtured in the simpler ways of former days. Nevertheless, appellants persist in their belief that the fundamental principles of our system of Government has not been altered and still persists.

The District Court of Guam as an individual possesses the inalienable right to hold any concept of Government, of constitutional theory or of trend of law which, in a private capacity, it may desire. We do contest the holding of any concept in a judicial capacity at variance with the established principles of our system of jurisprudence.

Appellants believe that the District Court of Guam, acting upon certain basic misconceptions of fundamental principles of our system of jurisprudence erred in this action in that the action was pre-judged in the light of those basic concepts and that the claim of appellants was considered to be basically untenable from its inception. We believe that the transcript of this hearing clearly shows that insofar as the District Court of Guam was concerned this was a matter involving income tax, that such a matter had been conclusively determined and that appellants were acting in a reprehensible and improper manner when they filed their complaint.

The following quotes from the comments of the learned Judge at the hearing, we believe, demonstrate beyond question that this action was decided beyond any doubt, not by the matters before the Court, but upon other and outside consideration. This,

it may be noted, is basically an action for breach of contract and damages flowing therefrom:

T. R. pp. 71-72.

". . . You contend that the employer has no right or authority to honor a distraint by the Government of Guam. We have the motion for summary judgment where the employers do consider themselves bound and have simply complied with the order of the Government of Guam. Now is there any issue except whether or not the Government of Guam has that Authority?

Mr. Phelan. Yes, we raise the issue of withholding. Title 26 says you do not withhold within a possession unless you are an employee of the United States.

The Court. It doesn't say the Government of Guam cannot require— . . ."

". . . The Court. Well, your issue is simply whether or not Section 31 of the Organic Act of Guam gives the local collector the authority to require withholding and to distraint for the non-payment of tax deficiencies . . ."

". . . The Court. But the employer has set up by affidavit his defense and that has not been countered by any affidavit. . ."

T. R. p. 74.

". . . This is simply the same old contention in different dress—that the Government of Guam has no authority under Section 31 to require people whose income is earned in Guam to pay an income tax on that income and give it to the collector or the authority to distraint in those

instances when the employee does not pay voluntarily and as a corollary of the imposition of the tax that the employer must withhold on the same basis as though the employee were being employed in the continental United States. Now what injustice are we dealing with here? What are we talking about that is wrong, that is injurious, that is unjust to the employee? . . ."

T. R. p. 75.

". . . The Court. In other words, you want to reach the question as to whether or not your client owed the tax?

Mr. Phelan. The question is has BPM any right to withhold the tax.

The Court. But the ultimate question is whether your client owed the tax. It is all part of the general pattern. Now if it is your contention that the collector is attempting to obtain from your client something to which the collector isn't entitled monetarywise then certainly you are entitled to relief in court most assuredly, but what relief can this court give you if the employer is merely doing what it is obligated to do by law? Granted that it may be onerous on the employer but that isn't the employee's responsibility or his privilege to say 'You are embarrassing my employer by an undue number of distraints' and so forth. Possibly the employer can complain but not the employee. It seems to me the employee has to come into this court and say 'Somebody is trying to take my property without due process of law, without giving me an opportunity to be heard.' . . ."

T. R. p. 76.

". . . The Court. It certainly is res judicata in that in principle this is a proper tax to be paid to the proper officials of the local government. . ."

T. R. pp. 78-79.

". . . The original complaint and the amended complaint represent nothing more than a continuance on the part of some delinquent taxpayers to defeat the Congressional purpose of Section 31 of the Organic Act of Guam. Regardless of any initial confusion as to the application of that provision, the determination of the courts is that the effect of Section 31 is to impose a territorial tax measured by the tax which the same individual would have to pay in the continental United States; that of necessity the Congress does not levy taxes unless it expects them to be collected, but in using the phrase 'income tax laws' it meant to do more than to levy a tax; that it intended to vest in the proper collection officials those machineries for collection which are essential to the obtaining of tax funds; that it has been the policy of the United States government for many years to impose the pay-as-you-go plan of income tax collection and as part of that collection method, it has required employers to withhold taxes and in turn has protected employers who withheld and paid taxes to the proper officials by denying the courts any right to interfere with them and requiring the aggrieved taxpayer to follow the administrative procedures. That is what has been done in Guam. . . ."

T. R. pp. 79-80.

> ". . . There is no showing here that the taxpayer has in any way been injured except that he is denied the assistance of the court in evading his tax responsibility. Nothing more. If he is not evading his tax responsibility then his remedy is against the collector who has received the withheld taxes. This complaint is again typical of almost impertinent type of pleading in which the pleader again infers that the tax collector is some kind of imposter, some person who alleges that he holds the position; attempting to surround the pleading with an impression that we are dealing here with a number of false public officials, people who pretend to act, people who pretend to to this . . ."

Appellants contend that these quotations from the hearing show that the District Court of Guam refused to consider anything as being before the Court except the question of the validity of the claimed territorial income tax; that the Court refused to consider, or even see, the question of breach of contract upon the part of the appellees; any question as to authority of the Government of Guam, or anyone else, to require withholding in Guam; the validity of the distraints and levies; the question of any delegation of authority by the Commissioner of Internal Revenue, or anyone else, with respect to the administration of any part of the Income Tax Laws of the United States. The Court clearly demonstrated that regardless of the pleadings, and admissions, the matter was a closed book, that there could be no merits

to the complaint; that every possible question with respect to this alleged income tax had been decided; and that appellants were wrong-doers who had no right to question any claim or asserted right put forth by any agents of the local Government.

Appellants believe that the deliberate avoidance of the points in the case and the determination of the matter based upon broad conclusions clearly shows that the Court did not consider the merits of the controversy but with the matter predetermined disposed of it in accordance with their views.

Therefore, the judgment should be reversed.

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## VII.

**THE DISTRICT COURT OF GUAM ERRED IN CONSTRUING THE PERTINENT STATUTES OF THE UNITED STATES, DISREGARDED THE CANONS OF STATUTORY CONSTRUCTION, ASSUMED AS PROVEN FACTS NOT IN EXISTENCE, DISREGARDED THE CLEAR LACK OF ANY AUTHORITY IN THE AGENTS OF THE GOVERNMENT OF GUAM, AND UPON SUCH ERRORS ENTERED SUMMARY JUDGMENT CONTRARY TO BOTH THE LAW AND THE FACTS.**

This action, commenced as an action for damages for breach of employment contracts, damages and other relief was converted by appellees, defendants below, into an action to determine the construction of portions of the Organic Act of Guam and the determination of the existence of the alleged territorial income tax. The District Court of Guam so

considered this action and disposed of it upon that basis. Appellants believe, therefore, that the complete grounds and basis for such determination is open for review and may properly be analyzed and discussed. That it is proper to consider, to examine and test the foundation upon which this judgment must be resting. Appellants believe that if this judgment is based upon an error of law or fact that it must fall and are confident that such is clearly evident in the record of this action.

Appellees caused to be filed in support of their motion to dismiss and for summary judgment an affidavit of Mr. Marshall, together with supporting exhibits. Appellants concede that Mr. Marshall did accurately relate clearly and correctly all the facts which are material. The status of the appellees within Guam, their work, the employment of appellants, the receipt of the levies and warrants of distraint, their withholding of pay as authorized by United States tax withholding forms executed by appellants, and the turning over to agents of the Government of Guam of the sums withheld from appellants' pay upon the demand of agents of Guam.

Appellants concede that the alleged warrants of distraint, the levies, their employment contracts and United States withholding forms are correct.

Appellants do not concur in the conclusion of the affidavit, that the action of appellees was lawful, that it was in response to lawful authority, or that there is any justification in law for the actions of appellees.

Appellants wish to make clear their position that they executed Federal withholding forms authorizing withholding for Federal taxes due, if any, and for no other purpose. That they believe the plain text of the Organic Act of Guam does not create a local tax but does confer upon the territorial Government the proceeds of any Federal taxes derived from Guam, and that lacking any statutory authority or delegation no local official possesses any legal right, duty or authority to perform any actions in connection with income tax, and therefore, all acts of such officers as set forth in the affidavit of Mr. Marshall are unwarranted and constitute no valid defense to appellees.

Appellants therefore assert that we can properly analyze the findings, expressed or implied, upon which of necessity the District Court of Guam based its decision; that the judgment in this case must fall if there is lacking one essential element required to support it.

Taking the foundation in logical order, as we believe we must, the first step is the alleged territorial tax. Appellants deem it clear that the District Court of Guam holds that there exists in Section 31 of the Organic Act (1421i T 48 U.S.C.A.) a separate and distinct local income tax, similar in text to the Federal, though changed in certain respects.

The District Court of Guam in reaching this conclusion, we submit, ignored the canons of statutory construction, and is either legislating judicially or accepting the executive legislative acts of the Gov-

ernment of Guam. The District Court of Guam further ignores the provisions and plain meaning of Section 30 of the Organic Act of Guam (1421h T 48 U.S.C.A.). It is believed that both sections should be read together, the one by its plain text extends the Federal income tax statutes to embrace Guam; the other giving to the local Government the proceeds of Federal taxes, no mention being made of local taxes.

We submit that the first canon of construction must be applied—that the intent of Congress must be sought first in the text, that if it is clear and workable no further construction is either necessary or permitted. In this case, we submit that the plain meaning of the text of the statute is that Guam is to receive all monies derived by the United States from Guam, including income taxes (Section 30), that the United States income tax laws do apply and are in force in Guam. Surely that is what the simple text says. It does not mention any tax, other than Federal.

*62 Cases of Jam v. United States,* 95 L Ed 566.

". . . But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete or to distort . . ."

*Helvering v. City Bank Farmers Trust Co.,* 80 L Ed 63 (296 US 85-92).

". . . We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of

the meaning of the words used. The section applies to this transfer . . ."

*Helvering v. San Joaquin Fruit & Invest. Co.,* 80 L Ed 824 (297 US 496-500).

". . . Language used in tax statutes should be read in the ordinary and natural sense . . ."

*United States v. Public Utilities Commission,* 97 L Ed 1020.

". . . Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation . . ."

*Osaka Shosen Kaisha Line v. United States,* 81 L Ed 532.

". . . This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction . . ."

*Helvering v. New York Trust Co.,* 78 L Ed 1361 (292 US 455-473).

". . . The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose . . ."

*Slough v. Comm. of Internal Revenue,* 147 F 2d 836.

". . . But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable conse-

quence, the words employed are to be taken as final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed . . . We adhere to the view that common sense interpretation is the safest rule to follow in the administration of income tax laws. Rhodes v. Comm. of In. Rev. 6 Cir., 100 F 2d 966, 969. . . ."

Clearly based upon the authority of these cases the Organic Act plainly, with no need for construction, provides that Federal income taxes are in force in Guam. Nowhere does it mention a local income tax.

What is the text of the income tax law in force in Guam pursuant to the Organic Act? The entire text of the United States income tax laws are expressly incorporated by reference in Section 31 of the Organic Act (1421i T 48 U.S.C.A.).

*Hecht v. Malley,* 68 L Ed 949 (265 US 144-164).

". . . In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment. Sessions v. Romadka, 145 U.S. 29, 43, 36 L. ed 609, 614, 12 Sup Ct Rep 799; Latimer v. United States, 223 U.S. 501, 504, 56 L ed 526, 527, 32 Sup Ct Rep 242 . . . Nor does the language of the act in this respect call for the application of the established rule that, in the interpretation of statutes levying taxes, their provisions are not to be extended by implication beyond the clear import of the language used, and in case of doubt are to be construed most strongly against the

government and in favor of the taxpayer. Gould v. Gould, 245 US 151, 153, 62 L ed 211, 213, 38 Sup Ct Rep 53; United States v. Merriam, 263 US 179, 187, ante, 240, 44 Sup Ct Rep 69. Here the language of the act is specific, leaving no substantial doubt as to its meaning; and the taxpayers are seeking by implication to limit its clear import . . ."

*Shapiro v. United States,* 92 L Ed 1787.

". . . in adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment' . . ."

*Henrietta Mining & M. Co. v. Gardner,* 172 U.S., 43 L Ed 637.

"The language of paragraph 40, as amended in 1891, having been taken from the California Code, it is presumed that it was taken with the meaning it had there, and hence we hold it worked a repeal of paragraph 42 of the Revised Statutes of Arizona of 1887; and *the judgment of the Supreme Court of the Territory is reversed* and the cause remanded for further proceedings in accordance with this opinion . . ."

Thus, having within the Organic Act the entire text of the income tax laws of the United States do we not have an entire system, long in force and tested by the courts of the United States in innumerable decisions. We contend that under the canons of construction all doubts and questions must not be solved by implication or by any other means than the text

of the income tax laws of the United States and the Federal decisions interpreting these laws. That when either the Government of Guam, or anyone else except the Congress, attempts to alter one word of the plain text of the income tax laws of the United States as contained in Section 30 of the Organic Act (1421i T 48, U.S.C.A.) it is the exercising of a legislative function and is neither the construction of a statute nor the resolution of an ambiguity but the unlawful exercise of the law-making power, and is void.

*Meriwether v. Garrett,* US 102, 26 L Ed 197.

". . . It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced . . ."

*Springer v. Philippine Islands,* 72 L Ed 845 (US 189-212).

". . . Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The

latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. Mayers v. United States, 272 US 52, 71 L ed 160, 47 Sup Ct Rep 21 . . ."

*Preston v. Sturgis Milling Co.,* 183 F. 3.

". . . Before stating more in detail than above the grounds upon which it is claimed that appellant is entitled to the relief which he sought, we desire to make good the fundamental principle which underlies the lower court's decision and to indicate its scope. That principle is that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority. . . ."

*Haskins Bros. & Co. v. Morgenthau,* 85 F 2d 677.

". . . But, as we have already pointed out, what is sought here is to compel the court to assume the legislative and executive authority of the United States and in effect enact a law to restrain and control the use of money in the treasury and direct the officers of the government to carry it into execution. This may not be done. Belknap v. Schild, 161 US 10, at page 18, 16 S Ct, 443, 40 L Ed 599. . . ."

Yet the Government of Guam and the District Court of Guam has assumed, by interpretation allegedly from necessary implication, to violate this rule and held that the plain text of the income tax law contained in the Organic Act of Guam is different than the text as published in T 26, U.S.C.A.

The statute is clear as to who is the official charged with the authority to administer and enforce the act. The Commissioner of Internal Revenue of the United States. Nowhere in the text of the Organic Act is to be found any authority from the Congress to alter or substitute. To no official is delegated such power or authority. The cases are clear and must be followed.

*United States v. Stewart,* 85 L Ed 40.

". . . It is likewise true that Congress will be presumed to have used a word in its usual and well-settled sense. Old Colony R Co. v. Commissioner of Internal Revenue, 284 US 552, 76 L ed 484, 52 S Ct 211; Deputy v. De Pont, 308 US 488, 84 L ed 416, 60 S Ct 363. But §26 does not exempt simply 'income;' it exempts the bonds and the 'income derived therefrom' . . ."

*MacKenzie v. United States,* 109 F 2d 540.

". . . The federal tax lien is entirely statutory, therefore its scope and effect are to be determined solely by the statute and the decisions interpreting it. The statute creating the lien is Section 3186 of the Revised Statutes, as amended, 26 U.S.C.A. §§1560, 1561, 1562, which read during the period involved herein . . ."

*United States v. Field,* 65 L Ed 617 (US 256, 257).

". . . Applying the accepted canon that the provisions of such acts are not to be extended by implication (Gould v. Gould, 245 US 151, 153, 62 L ed 211, 213, 38 Sup Ct Rep 53), we are con-

strained to the view—notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment . . ."

*Federal Trade Com. v. A.P.W. Paper Co.,* 90 L Ed 1165 (328 US 193-204).

". . . We cannot lightly infer that this specific right was intended to be swept away under the 1938 Commission Act. Repeals by implication are not favored. Yet if the order of the Commission stands, the right granted or recognized by the 1910 Act becomes a nullity . . ."

*Helvering v. Stockholms Enskilda Bank,* 79 L Ed 211.

". . . In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts 'are not to be extended by implication beyond the clear import of the language used,' and that doubts are to be resolved against the government and in favor of the taxpayer . . ."

*Ex Parte Endo,* 89 L Ed 243.

". . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used. . . ."

*Morrill v. Jones,* 27 L Ed 267.

". . . The Secretary of the treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted . . ."

*Helvering v. Griffiths,* 87 L Ed 843 (318 US 371-411).

". . . Under our judicial tradition we do not decide whether a tax may constitutionally be laid until we find that Congress has laid it. Unless the tax asserted by the Commissioner has been authorized by Congress, it fails of validity before we even reach the constitutional question. To reach that question we must decide whether Congress intended by §115 (f) (1) to do what Eisner v. Macomber squarely held that it could not. We cannot find that it did . . ."

The officers of the Government of Guam have no power or authority to administer this Act. Such a power cannot be assumed and can only be created by legislative action.

*Atchison, T. & S. F. Ry. Co. v. Elephant Butte Irr. Dist.,* 110 F 2d 767.

". . . (5) An assessment can be made only by an official or board designated by law to make it. An attempted assessment by any other person or board is void . . ."

*Stark v. Wickard,* 88 L Ed 748.

". . . When Congress passes an Act empowering administrative agencies to carry on governmental

activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf United States v. Morgan, 307 US 183, 190, 191, 83 L ed 1211, 1216, 1217, 59 S Ct 795."

*Federal Trade Commission v. Raladam Co.,* 75 L Ed 1330.

". . . Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions . . ."

*J. P. Stevens Engraving Co. v. United States,* 44 F 2d 822.

". . . The tax officers can proceed only by virtue of the statutes, and must proceed strictly according to them . . ."

The authority of these officers who signed the warrants of distraint, the levies, and received the monies is neither contained in the statute nor has it been delegated to them by any competent authority. Such delegation is forbidden to the Commissioner. It has

not been done by Congress. Therefore, their assumed powers must be void.

*Joy Floral Co. v. Commissioner of Int. Rev.,* 29 F 2d 865.

". . . The powers of the Commissioner, it may be noted, are purely statutory, and must be construed accordingly . . ."

*Toledo, P U W.R.R. v. Stover,* 60 F Supp 587.

". . . The executive department of our government cannot exceed the powers granted to it by the Constitution and the Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect . . ."

The Legislature of Guam has enacted no statute with reference to this, or any other income tax law, and has not authorized or created any offices to administer this alleged tax. This is a matter which the District Court of Guam should have judicially known. Without such authority from the Legislature their acts are void. Only the lawmaking power can create an office. This it has not done.

*Youngstown Sheet and Tube Co. v. Sawyer,* 96 L Ed 1169.

". . . The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. 'The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power' . . ."

*Goshnower v. United States,* 63 L Ed 328 (248 US).

". . . Primarily we may say that the creation of offices and the assignment of their compensation is a legislative function. Glavey v. United States, 182 US 595, 45 L ed 1347, 21 Sup Ct Rep 891; United States v. Andrews, 240 US 90, 60 L ed 541, 36 Sup Ct Rep 349. And we think the delegation of such function and the extent of its delegation must have clear expression or implication . . ."

The Congress of the United States, except as to the unaltered text of the income tax laws has not provided any standards; or, if, as the District Court of Guam holds, there is a territorial tax it is void for lack of standards. The standards for the United States income tax cannot be the ones for another tax of a different text.

*United States v. Wright,* 48 F Supp 687.

". . . The act, as amended, meets the proper tests in deciding the question of delegation: (1) The statute contains a clear statement of the policy and purpose which Congress seeks to accomplish; and (2) it contains an intelligible statement of the standards by which that purpose is to be worked out. . . ."

*Panama Refining Co. v. Ryan,* 79 L Ed 446.

". . . Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has required any finding by the President in the ex-

ercise of the authority to enact the prohibition . . ."

*Carlson v. Landon,* 96 L Ed 547.

". . . B. Delegation of Legislative Power—This leaves for consideration the constitutionality of this delegation of authority. We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections. Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose."

The income tax found by the District Court of Guam to exist is vague and ambiguous since its text has not been published. If the text varies and it has been held by the District Court of Guam to vary from the text of the United States Statute how is any person to know how and in what manner it applies to him?

*Ebert v. Poston,* 69 L Ed 435.

". . . We have no occasion to state them. The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A casus omissus does not justify judicial legislation. Compare United States v. Weitzel, 246 U.S. 533, 543, 62 L ed 872, 874, 38 Sup Ct Rep 381 . . ."

*United States v. Five Gambling Devices,* 98 L Ed 179.

". . . The Act gives no hint as to where the 'district' is or how a person can locate it. It never describes any 'district'. Yet failure to comply with these unascertainable requirements is punishable by fine up to $5,000, imprisonment up to two years, or both. This punishment, at least, is certain. I would apply the established rule that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law'. Connally v. General Constr. Co., 269 US 385, 391, 70 L ed 322, 328, 46 S Ct 141 . . ."

The alleged territorial income tax, held by the District Court of Guam to exist violates the principle that taxing statutes shall not be altered, amended or extended except by clear command of the lawmaking body. This the alleged territorial income tax, as claimed to exist, violates.

A statute cannot be repealed by implication. The claimed territorial income tax law of Guam as found by the District Court of Guam repeals by implication Section 251 of the Revenue Act of 1939, now 931 of the Revenue Act of 1954. Yet there is nothing in the text of the Organic Act to warrant this.

*United States v. 200 Barrels of Whiskey,* 24 L Ed 491, (95 US 571-576).

". . . The rules and regulation which the Commissioner of Internal Revenue is authorized by

section 2 to prescribe cannot have the effect of bringing the case under the operation of the penalty provided in section 96, if it was already covered by section 57. The regulations of the Department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."

*Iselin v. United States,* 70 L Ed 566 (270 US 245-251).

". . . The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare United States v. Weitzel, 246 US 533, 543, 62 L ed 872, 874, 38 Sup Ct Rep 381; Peoria & P.U.R. Co. v. United States, 263 US 528, 534, 535, 68 L ed 427, 430, 431, 44 Sup Ct Rep 194 . . ."

*Southeastern Alaska Mining Corporation v. Zavodsky,* 60 F 2d 24.

". . . It is a most ordinary rule of statutory construction that repeals by implication are not favored, and that a statute dealing with a particular subject is not modified by a later enactment which may, by its provisions, enlarge remedies which are by the first act restricted. It seems unnecessary to cite authorities to this point, because the rule adverted to is elementary. . ."

*United States v. Burroughs,* 77 L ed 1096 (289 US 159-165).

". . . The implied repeals are not favored, and if effect can reasonably be given to both statutes the presumption is that the earlier is intended to remain in force. . . ."

The acts of the agents of the Government of Guam and of the appellees as set forth in the affidavit of Mr. Marshall being acts of unauthorized agents, without legally delegated power and holding an office the powers of which have not been granted by the Legislature clearly violated the provision of IV and V Amendment of the Constitution and the Bill of Rights of Guam, Section 1421b T 48, U.S.C.A.

*Cross v. Georgia Iron & Coal Co.,* 250 Fed Rep, p. 439.

". . . An assessment of property for taxation can be validly made only by an official or body designated by law to make it. Cooley on Taxation . . ."

*Miller Brothers Company v. Maryland,* 98 L Ed 745.

". . . It is a venerable if trite observation that seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law. 'No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.' New York, L. E. & W. R. Co. v. Pennsylvania, 153 US 628, 646, 38 L ed 846, 853, 14 S Ct 952. . . ."

The amending of a statute of the United States by executive or judicial action violates the provisions of Article I, Section 1, of the Constitution. This clearly has been done and approved by the District Court of Guam.

The creating of a tax by implication and by executive construction as herein approved by the District Court of Guam violates the provision of Article I, Section 8 of the Constitution.

Title 26, U.S.C.A. specifically incorporated into Section 31 of the Organic Act (the income tax law portion) specifies how taxes may be, and shall be assessed, and by whom. In the absence of a valid assessment there is no tax and all actions to collect the same are void. Herein it is admitted that the Commissioner of Internal Revenue of the United States did not assess this tax.

> *Atchison, T. & S. F. Ry Co. v. Elephant Butte Irr. Dist.,* 110 F 2d 767.
>
> ". . . (5) Assessment can be made only by an official or board designated by law to make it. An attempted assessment by any other person or board is void . . ."

Since taxing, as well as other statutes, can only be amended by legislative action the necessary changes claimed to have been made to the text can only be sustained upon the theory that interpretive instructions are not only necessary but have been authorized. This power must be expressly conferred and, if conferred, when exercised must be published. Wherein

has it been granted; to whom; and what are the limits for its exercise? None is contained in the Organic Act and any court may notice that the only grant in Title 26, U.S.C.A. is to certain enumerated Federal officers. Thus, clearly, the exercise of the assumed authority to construe claimed by and for agents of Guam is in error. Incidentally, even if it exists, which we cannot concede, it has not been validly exercised and, these interpretations exist entirely in dicta by the District Court of Guam in various actions.

*St. Louis Merchants' Bridge T. Ry. Co. v. United States,* 188 Fed Rep 191.

". . . A legislative body may delegate the power to find some fact or situation on which the operation of a law is conditioned, or to make and enforce regulations for the execution of a statute according to its terms. Union Bridge Co v. United States, 204 US 364, 386, 27 Sup Ct 367, 51 L ed 523; Marshall Field & Co v. Clark, 143 US 649, 677, 693, 694, 12 Sup Ct 495, 36 L Ed 294; Caha v. United States, 152 US 211, 218, 219, 14 Sup Ct 513, 38 L ed 415; St. Louis & I.M. Ry. v. Taylor, 210 US 281, 287, 28 Sup Ct 616, 52 L ed 1061; Coopersville Co Operative Creamery Co. v. Lemon, 163 Fed 145, 147, 89 C.C.A. 595.

But it cannot delegate its legislative power, its power to exercise the indispensable discretion to make, to add to, to take from, or to modify the law. 'The true distinction', said Judge Ranney for the Supreme Court of Ohio in Cincinnati, Wilmington & Zanesville RR Co v. Commissioners, 1 Ohio St 77, 88, in a declaration which has been repeatedly approved by the Supreme Court,

'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made . . ."

*Hirabayashi v. United States,* 87 L ed 1774 (320 US 81-114).

". . . The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. Cf. The Aurora v. United States, 7 Cranch (US) 382, 3 L ed, 378; United States v. Chemical Foundation . . ."

*Hotch v. United States,* 212 F 2d 280.

". . . The Congressional directive in regard to the procedure to be followed in the issuance of agency regulations must be strictly complied with, since the issuance of regulations is in effect an exercise of delegated legislative power . . ."

Thus, appellants contend that the District Court of Guam could not have entered summary judgment for appellees in this case without finding that there is a separate and distinct territorial income tax law. That its text differs from the text of the income tax law of the United States; that it is to be administered by local officers who were lawfully appointed and authorized to do so; that the Governor of

Guam has the authority to create such officers and determine their powers; that the claimed law is clear, unambiguous, and certain; possesses standards; that Congress did repeal Section 251 of the Internal Revenue Act of 1939 and Section 1621 (8) B of that Act; that there was no infringement of any rights guaranteed by the Constitution or the Organic Act of Guam.

All these facts must have been so held by the District Court of Guam for it to have entered this judgment.

We believe that we have conclusively demonstrated the many fundamental errors upon which this judgment was based and that, therefore, the District Court of Guam should be reversed.

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**CONCLUSION.**

Appellants claim that they have clearly spelled out the numerous errors of the District Court of Guam; that this judgment being contrary to the law which governs this action, that the basis upon which the judgment rests being untenable the judgment must be reversed.

Dated: Agana, unincorporated territory of Guam, 20 October, 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,

*Attorney for Appellants.*